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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 713

WINDHAM CREAMERY, INC., AND
FARMLAND DAIRIES, PETITIONERS

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 230 F. Supp. 632. The opinion of the court of appeals (Pet. App. 9a–16a) is reported at 350 F. 2d 978.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on August 13, 1965. The petition for a writ of certiorari was filed on November 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of the New York-New Jersey Milk Marketing Order relating to the classi-

fication and pricing of fluid cream are a valid exercise of the authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937.

2. Whether the classification and pricing provisions of the Milk Marketing Order are applicable to petitioners' deliveries of cream within the marketing area for ultimate consumption on ships outside the United States.

3. Whether, under the provisions of the Order, petitioners' cream delivered to ships at piers in New York City was properly classified and priced as Class II milk.

STATUTE AND ORDER INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 [1] and the New York-New Jersey Milk Marketing Order [2] are set out in the Appendix, *infra,* pp. 15–18.

STATEMENT

Petitioner, Windham Creamery, Inc., operator of a milk pool plant in Windham, New York, was a fully regulated "handler" as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937,

[1] Act of June 3, 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, re-enacting and amending provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31, as amended by Act of August 24, 1935, 49 Stat. 750).

[2] Order No. 2 (formerly Order No. 27), as amended, 7 C.F.R. 1002.1, *et. seq.* (1965 Rev.), superseding 7 C.F.R. 927.1, *et seq.* (1961 Supp.). To maintain consistency with the record, the decisions below, and the petition, we shall refer to the order as No. 27 and, unless otherwise indicated, cite to the 1951 Supplement of 7 C.F.R.

50 Stat. 246, as amended, 7 U.S.C. 608c(1), *infra*, p. 15. Windham received raw milk from farmers and shipped it to a New Jersey plant owned by petitioner Farmland Dairies, Inc., Windham's parent corporation,[3] where it was processed into fluid cream. American Export Lines, Inc., purchased some of this cream from Farmland and had it delivered to some ships docked in New York City and others docked in Hoboken, New Jersey. Petitioners instituted these proceedings under Section 8c(15) of the Act, 7 U.S.C. 608c(15), *infra*, pp. 16–17, to challenge the provisions and application of the New York-New Jersey Milk Marketing Order ("Order No. 27") under which the cream delivered to American Export's ships was classified.

1. *Background.* The following brief sketch of the economic, statutory and administrative background of Order No. 27 may be helpful to the Court.[4]

The supply of milk and the demand for it are subject to sharp variations. Apart from considerable fluctuations in the daily demand for milk, there are seasonal cycles in the supply, so that there is nearly twice as much milk available in June as there is in November. Storage of the excess supply to meet a later peak in demand is not possible because of the highly perishable nature of fluid milk. Surplus milk,

[3] While this case was pending before the court of appeals, Windham was dissolved and its operations and assets taken over by Farmland (Pet. 5).

[4] A more detailed discussion of the regulation of the milk industry may be found in *Nebbia* v. *New York*, 291 U.S. 502; *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (involving Order No. 27); and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588.

i.e., the milk which exceeds the current demand for fluid milk as a beverage, is utilized in the production of cream, butter, cheese, milk powder, and similar items, but for those purposes, it can be sold only at a greatly reduced price. In an unregulated market, the vigorous competition of producers for the more profitable sales of fluid milk results in business practices which jeopardize both the commodity's quality and the quantity available.[5] Regulation of the industry seeks to eliminate this situation and to distribute equitably among producers the burden of the lower value surplus milk.

Under the Agricultural Marketing Agreement Act—which provides a scheme for regulating the marketing of milk and its products in the current of, or affecting, interstate or foreign commerce—the Secretary of Agriculture is authorized to issue regional milk marketing orders, each specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c(5), (11). The orders are to be designed to assure uniform minimum prices to each milk producer, regardless of the use to which his milk is ultimately put, while fixing payments by handlers in accordance with the uses they actually make of the milk and the value to the handlers of those uses.[6]

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[5] See *United States* v. *Rock Royal Co-op.*, *supra*, 307 U.S. at 550; *Nebbia* v. *New York*, *supra*, 291 U.S. at 518.

[6] The Act specifies that a milk order shall contain one or more of certain terms and conditions, including the following: (1) the classifying of milk in accordance with its form or its utilization; (2) the fixing, or providing a method for the fixing, of minimum uniform prices for each use classification which all handlers shall pay; (3) the payment of uniform prices to producers irrespective of the ultimate use of their

In 1938, pursuant to this authority, the Secretary issued Order No. 27, categorizing all milk subject to regulation in the marketing area into three general classes (I, II and III), reflecting, in descending order, the differing economic values of milk depending on its end use. 7 C.F.R. 927.37. For example, fluid milk used as a beverage, having the highest value, was designated as Class I. Under this Order, pool plant handlers are required to report to a Market Administrator the quantity of milk they purchase each month, broken down into the three classes according to utilization. 7 C.F.R. 927.50. The Market Administrator determines the minimum price for each class (7 C.F.R. 927.40, *et seq.*) and, applying these prices to the total reported utilizations for the month, calculates a uniform or "blend" price (7 C.F.R. 927.65, *et seq.*), which is the minimum price each pool plant handler must pay each producer for the milk supplied the plant by that producer. 7 C.F.R. 927.70. The Market Administrator maintains a "Producer Settlement Fund" for the adjustment of accounts among the various handlers in the area. 7 C.F.R. 927.75. If the use value of the milk disposed of by a handler during the month (calculated on the basis of the minimum prices set by the Administrator and the quantities of each class of milk disposed of) exceeds the total "blend" price he is required to pay his producers, he must deposit the excess into the fund. If the use

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milk; and (4) the adjustment of the payments by handlers in order that the total sum paid by a handler for milk purchased by him shall not be less than the value of the milk at the use classification prices. 7 U.S.C. 608c(5).

value of the milk disposed of is lower than the total "blend" price he is required to pay, the handler is entitled to receive the difference from the fund.

The marketing area covered by Order No. 27 as originally issued consisted of the five counties in New York City and the three suburban counties of Westchester, Nassau and Suffolk. 3 Fed. Reg. 1945, 1957, 2100, 2102. In 1951, the Order was amended to include all piers, docks and wharves within the eight counties and all craft moored there. 16 Fed. Reg. 12851, 7 C.F.R. 927.3. Finally, in 1957, the marketing area was extended to northern New Jersey and certain additional areas in upstate New York. 22 Fed. Reg. 4644, 7 C.F.R. 927.3.

Before the 1957 amendment, all cream in New York City and the three suburban counties—which were designated in 1957 as the "New York metropolitan district" (7 C.F.R. 927.3(a))—was categorized in Class II, while cream distributed outside that area was placed in Class III.[7] This classification reflected the fact that cream sold in the metropolitan district had a higher economic value than cream disposed of elsewhere. When, after lengthy proceedings,[8] the Secre-

[7] Under Order No. 27, all of the milk disposed of by a fully regulated handler, and not merely that portion which is disposed of in the marketing area, is pooled, classified and priced. See 7 C.F.R. 927.29, 927.33.

[8] Public notices were given (21 Fed. Reg. 3537, 3799, 6680; 22 Fed. Reg. 1219); public hearings, at which evidence was taken, were held, and an extensive record was compiled (22 Fed. Reg. 4194). A recommended decision was issued (22 Fed. Reg. 3318) and time was given to file exceptions thereto. The Secretary's final findings and conclusions were issued on June 10, 1957 (22 Fed. Reg. 4194).

tary decided to broaden the marketing area covered by Order No. 27 to include parts of New Jersey and additional parts of New York, he also considered the question of the classification of cream in the added areas. On the basis of the record evidence as to the utilization value of cream and the various proposals made by both producer and handler interests, the Secretary determined that the cream disposed of in the pre-1957 marketing area could command a higher price (*i.e.*, had a greater utilization value to the handler) than cream disposed of elsewhere. 22 Fed. Reg. 4210. Giving effect to the premise of all concerned that the classification of milk products should be based on utilization value, the Secretary determined that cream should continue to be classified as Class II under Order No. 27, with the exception that cream disposed of outside the New York metropolitan district would be priced at the Class III level. 22 Fed. Reg. 4649, 7 C.F.R. 927.27(c), (d)(1), *infra*, p. 18.

2. *Decisions Below.* Petitioner Windham challenged the provisions under which the cream it delivered in New York City was classified in Class II while the cream delivered in New Jersey was classified in Class III. After extensive proceedings, the Secretary, acting through his Judicial Officer, denied Windham's protest. He ruled that the different pricing for cream provided by Sections 927.37(c) and (d)(1) of the Order had been established to return to producers the greater use value which their milk had when disposed of in the New York metropolitan district [9] and

[9] In this connection, the Secretary referred to the proceedings connected with the 1957 amendment of Order No. 27, and to the

that those sections not only were authorized but were necessary to reflect economic conditions that affected market supply and demand for milk and its products in the various parts of the marketing area (C.A. App. 140a–141a). The Secretary also ruled that the delivery of the cream to the ships docked in New York City clearly was delivery within the New York metropolitan district as defined by Order No. 27; that a sufficient basis had been shown for including piers, docks, wharves and all ships moored there within the area of regulation; and that there was no basis for adopting a construction of Section 927.37 to avoid the Class II classification of petitioners' deliveries in New York City (C.A. App. 135a–139a).

On review of the administrative decision, the district court granted summary judgment in favor of the Secretary, upholding his ruling in all respects, and the court of appeals affirmed.

ARGUMENT

1. At no point during the administrative or judicial proceedings below did petitioners assert or attempt to show that there was insufficient support for the Secretary's finding—upon which his classification was based—that cream has a greater utilization value in the New York metropolitan district than it does in northern New Jersey and upstate New York. Nor have petitioners suggested that the Class II and III prices established by the Order do not correctly reflect

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fact that the evidence there presented demonstarted that cream commanded a higher price in the New York metropolitan district than outside of that area (C.A. App. 131a–134a; 140a–141a).

these differences in utilization value. In these circumstances, there can be no serious claim that the challenged sections of the Order are discriminatory in operation. Petitioners pay the same minimum price for cream disposed of within the metropolitan district (Class II) and outside the district (Class III) as do all other Order No. 27 handlers disposing of cream in the same location, and, in each instance, the price paid fairly reflects the value of the cream to the handler in the market in which it is being utilized.

Petitioners contend (Pet. 8–10), however, that milk having the same physical form and function may not be classified differently on the basis of utilization value under Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A), *infra*, pp. 15–16. That section in terms authorizes the classification of milk in accordance with "the form in which or the purpose for which it is used." Since the basic legislative objective underlying the classification provisions was to insure that the minimum amount each handler pays for his milk reflects the value of that milk in the utilization made of it by him, the Secretary was plainly justified in construing the statutory authorization to classify milk according to "the purpose for which it is used" as comprehending classification determined by differences in utilization value.

As the court of appeals noted (Pet. App. 13a), not only is the Secretary's interpretation of Section 8c (5)(A) reasonable in light of the purposes of the Act, but it has been applied by him since the inception of federal milk marketing regulation without "legislative or judicial interdiction" (Pet. App. 13a). In

United States v. *Rock Royal Co-op.*, 307 U.S. 533, 565–567, this Court considered and rejected the contention that the variant treatment given to fluid milk disposed of in different geographic areas was unlawful. And in Section 4 of the Agricultural Marketing Agreement Act, Congress expressly ratified several milk marketing orders which had previously been issued under the authority of the Agricultural Adjustment Act of 1933, as amended. Under each of these orders, while all fluid milk disposed of by regulated handlers was subject to minimum class prices, the prices fixed for such milk utilized inside the marketing area were different from those applicable to utilization outside of that area. See, *e.g.*, Section 913.4(b) of Order No. 13 (Kansas City, Missouri), 4 Fed. Reg. 3761. The fact that, in the present case, the two classifications for fluid cream relate to disposition in different portions of the same overall marketing area is of no significance. As the court of appeals correctly concluded (Pet. App. 13a–14a):

> In the present case, the challenged order gives effect to the very differences in utilization value, expressed in terms of the same separate localities that served to distinguish class II cream from class III when those localities were not in the same marketing area. No relevant factor has changed except the boundaries of the marketing area. We find nothing in the statute that requires that an otherwise rationally justified geographic classification be invalidated merely because the localities involved are all within the same marketing area.

Even if petitioners were correct in their view that the Secretary was required to place all cream in the marketing area in a single classification—without regard to the economic factors involved—they have failed to show that they were injured by the Secretary's action. While they would naturally prefer that all their cream be placed in the lowest priced category (Class III), the basic cream classification under Order No. 27 has always been Class II, and petitioners have made no contention or showing that this classification is improper. Thus, under petitioners' theory, the exception for cream disposed of outside the metropolitan district would be invalid, and petitioners would be required to pay higher prices for their cream disposed of in New Jersey than they were in fact called upon to pay under the terms of the Order in its present form.

2. Petitioners' contention (Pet. 11–16) that their cream was not subject to regulation because it was in the current of foreign commerce is without merit. Section 8c(1) of the Act, 7 U.S.C. 608c(1), *infra*, p. 15, expressly authorizes the Secretary to regulate milk which "is in the current of interstate or *foreign commerce*, or which directly burdens, obstructs, or affects, interstate or *foreign commerce* * * *" (emphasis added). See also 7 U.S.C. 610(j). Moreover, as the court of appeals pointed out (Pet. App. 14a), the classification of cream involved here was "an exercise of the Secretary's unquestioned power in the area of interstate commerce." In this connection, the court cited the Secretary's finding (16 Fed. Reg. 11352),

which petitioners have not shown to be unfounded, that "an indeterminable portion of commissary milk [*i.e.*, milk delivered to ships for consumption thereon] can reasonably be expected to be consumed while the carrier is moored within the legal bounds of the marketing area." In addition, the court referred to other unchallenged findings of the Secretary which demonstrated that "in origin and handling the milk in controversy was part of that complex of domestic production, processing and disposition which is a phenomenon and a problem of that domestic commerce with which the statute and its administration are primarily concerned" (Pet. App. 14a–15a).[10]

3. Finally, petitioners argue (Pet. 16–19) that all of the cream should be regarded as having been constructively delivered to the purchaser at the latter's office in New Jersey and thus entitled to be classified and priced as Class III milk. The court below refused to adopt this fiction to enable petitioners "to escape the normal consequences of their agreed and actual conduct" (Pet. App. 16a). We submit that the decision below, in this and all other respects, was plainly correct.

[10] Section 927.37 of Order No. 27 merely classifies regulated milk on the basis of its utilization prior to shipment in foreign commerce and without regard to its ultimate utilization. The milk involved here moved in interstate commerce from the State of New York to the plant in Fairlawn, New Jersey, and was transported, in the form of cream and other milk products, in interstate commerce to a purchaser in New York City. Classification was based upon the form in which the milk left the Fairlawn plant (7 C.F.R. 927.30, *infra*, pp. 17–18), and the operation of Section 927.37 was completed before any movement in foreign commerce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1966.

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APPENDIX

1. The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, provide:

7 U.S.C. 602(1):

> Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

7 U.S.C. 608c(1):

> The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(5):

> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations or producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

* * * * *

7 U.S.C. 608c(15):

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of

complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

2. The relevant provisions of the New York-New Jersey Milk Marketing Order (formerly Order No. 27, 7 C.F.R. 927.1, *et seq.*, now Order No. 2, 7 C.F.R. 1002.1, *et seq.*) which were in effect at the times pertinent to this case are as follows:

7 C.F.R. 927.3(a):

The city of New York and counties of Nassau, Suffolk (except Fisher's Island) and Westchester in the State of New York (such territory being referred to in this part as the "New York metropolitan district").

7 C.F.R. 927.30:

Basis of classification. All milk the butterfat from which is received at a plant at which the classification of milk received from producers is to be determined pursuant to § 927.33, and all milk entering the marketing area in the form of milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, or skim milk, shall be

classified in accordance with the form in which it is held at, or moved from the plant at which classification is determined. Such classification shall be subject to the conditions set forth in §§ 927.31 through 927.35.

7 C.F.R. 927.37:

* * * * *

(c) Class II milk shall be all milk the butterfat from which leaves or is on hand at the plant in the form of cream, sweet or sour, half and half, fluid cream products, or in the form of cultured or flavored milk drinks, containing less than 3.0 percent or more than 5.0 percent of butterfat, unless such cream, half and half, fluid cream products, or cultured or flavored milk drinks are established to have been so handled or marketed as to classify such milk in some other class named in this section.

(d) * * *

(1) All milk the butterfat from which leaves or is on hand at the plant in the form of cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat or in the form of cream, half and half, or fluid cream products which cream, half and half, fluid cream products, or cultured or flavored milk drinks is delivered to a plant or a purchaser outside the New York metropolitan district and remains outside the New York metropolitan district.

U.S. GOVERNMENT PRINTING OFFICE: 1965